

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   JOSE FRANCISCO SOSA,                   :

4                   Petitioner                   :

5           v.                   :   No. 03-339

6   HUMBERTO ALVAREZ-MACHAIN,                   :

7   ET AL.;                   :

8   and                   :

9   UNITED STATES,                   :

10           v.                   :   No. 03-485

11   HUMBERTO ALVAREZ-MACHAIN,                   :

12   ET AL.                   :

13   - - - - -X

14                                   Washington, D.C.

15                                   Tuesday, March 30, 2004

16           The above-entitled matter came on for oral  
17 argument before the Supreme Court of the United States at  
18 11:05 a.m.

19 APPEARANCES:

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21 Department of Justice, Washington, D.C.; on behalf of  
22 Petitioner the United States.

23 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of  
24 the Private Petitioner.

25 PAUL L. HOFFMAN, ESQ., Venice, California; on behalf of

1       the  
2               Respondents .

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
next in No. 03-339, Jose Francisco Sosa v. Humberto  
Alvarez-Machain, and the United States v. the same.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT  
ON BEHALF OF PETITIONER THE UNITED STATES

MR. CLEMENT: Mr. Chief Justice, and may it  
please the Court:

The Ninth Circuit found that the arrest at issue  
here was one unauthorized, false, and in violation of  
international law because it occurred in Mexico.  
Nonetheless, the court found inapplicable the exception in  
the Federal Tort Claims Act for claims arising in a  
foreign country.

At the same time, the court read the bare  
jurisdictional terms of section 1350 in title 28 to  
provide courts with the authority to infer causes of  
action from sources of customary international law,  
including treaties that the political branches have  
expressly refused to ratify.

The resulting decision, which reads express  
grants of executive authority narrowly and implied grants  
of judicial authority broadly, turns the established

1 separation of powers regime for dealing with international  
2 issues on its head.

3 The Ninth Circuit first construed executive  
4 authority narrowly by holding that the DEA agents lacked  
5 the authority to effect an arrest in Mexico or abroad.  
6 That decision -- that holding has several problems, not  
7 the least of which is that by its terms it would preclude  
8 Federal agents from making an arrest abroad even in  
9 circumstances where the foreign country consents or there  
10 is no foreign government that is functioning to provide  
11 consent.

12 QUESTION: Mr. Clement, you -- you have a number  
13 of strings to your bow. Is -- is one of them more  
14 important than the others?

15 MR. CLEMENT: Well, regrettably --

16 QUESTION: I mean, it -- it's unlikely that  
17 we're going to go through the whole list of your -- your  
18 reasons for reversing here and say you're right on every  
19 one. If we -- if we pick one, is there one that is --  
20 that is more important to the Government than the others?

21 MR. CLEMENT: Well, regrettably, Justice Scalia,  
22 this is the rare case where I think they really are of  
23 quite significance because what the Ninth Circuit has held  
24 is, on the one hand, Federal agents, including the FBI,  
25 would lack the authority to make arrests abroad. They've

1     also ruled in a way that I think really reads the foreign  
2     country exemption out of the Federal Tort Claims Act and  
3     then, of course, on the 1350 issue, that is an issue of  
4     tremendous importance to the Government and also to the  
5     broader community. So I guess if --

6             QUESTION: That's not your -- you're just  
7     arguing the Federal Tort Claims Act first. Is that -- in  
8     -- in this argument that we're hearing now, we're dealing  
9     with the Federal Tort Claims Act and not 1350?

10            MR. CLEMENT: I actually intend to cover them  
11     both in -- in my initial period. Now, Mr. Phillips is  
12     going to be covering just 1350 because that's the only  
13     issue that affects his client. But the United States is  
14     both the petitioner in the case that raises the Federal  
15     Tort Claims Act issue, but also a respondent in support of  
16     petitioner with respect to 1350. So it's an ambitious  
17     goal in -- in 25 minutes, but I hope to address them both.

18            QUESTION: Well, getting back to Justice  
19     Scalia's question, I -- I suppose the President or the  
20     Attorney General could make an order with respect to  
21     extraterritorial arrests, and that would eliminate one  
22     rationale of the court of appeals. Or am I wrong about  
23     that?

24            MR. CLEMENT: Well, I think you are wrong about  
25     that, Justice Kennedy, because as I read the ruling of the

1 Ninth Circuit, they say that the President, the executive,  
2 the Attorney General lack the authority to make an  
3 extraterritorial arrest, and they specifically --

4 QUESTION: I guess you would have to get to that  
5 issue first.

6 MR. CLEMENT: That's right. Now, I think --

7 QUESTION: And they said even if it had the  
8 authority, it -- it has to be from a high official.

9 MR. CLEMENT: That actually wasn't the -- the  
10 reasoning of the majority opinion. There's a concurrence  
11 by, I think, five of the six justices in the majority that  
12 said at a minimum you'd need a high-ranking official, but  
13 the majority opinion that's the law of the Ninth Circuit  
14 is that regardless of who approves the operation, the  
15 President categorically lacks that authority. And that's,  
16 of course, the --

17 QUESTION: Were -- were the majority --

18 QUESTION: Mr. Clement, may I ask you? Is -- am  
19 I correct in thinking if we agree with you on -- on that  
20 issue, that disposes of the entire case?

21 MR. CLEMENT: I -- I think that's correct,  
22 Justice Stevens. Now, I would say that it -- the other  
23 issues in the case are logically in some respects anterior  
24 to that question, especially because the -- for example,  
25 the section 1350 really is a question about the -- the

1       very jurisdiction of the courts.

2               QUESTION:   Yes, but you certainly don't have to  
3       address that if you think they're wrong as a statutory  
4       matter, that there -- there, in fact, was no arbitrary  
5       arrest here.

6               MR. CLEMENT:   That's exactly right, Justice  
7       O'Connor.   There's no way I can tell you that you have to  
8       address those other issues.

9               QUESTION:   No, no.

10              MR. CLEMENT:   I think, though, there's nothing  
11       that would stop the Court from addressing those issues,  
12       and those --

13              QUESTION:   Well, we'd have to be pretty  
14       ambitious because some of them weren't addressed below and  
15       they're contrary -- the position being taken today is  
16       contrary to the position taken by previous Solicitors  
17       General.   I mean, it's kind of a new question.   I'm not  
18       sure it was even raised and argued below.

19              MR. CLEMENT:   Well, we think it was raised and  
20       argued below, Justice O'Connor, and I think the 1350 issue  
21       is of tremendous continuing importance.

22              I mean, if I could -- if I could address the  
23       point that you raised about the change in position.   It is  
24       true that the United States in the Filartiga case took a  
25       different position.   Now, subsequent that -- to that, the



1 administration has -- different administrations have taken  
2 the position that 1350 is just jurisdictional.

3 And if I could draw an analogy to the experience  
4 that this Court has had, in 1947 this Court upheld the  
5 constitutionality of State statutes that provided  
6 reciprocity in inheritance laws with foreign countries and  
7 said that was okay. 21 years later, with the -- sort of  
8 benefit of hindsight and the experience with State court  
9 judges causing foreign policy problems, this Court in the  
10 Journing case revisited that decision. And in a similar  
11 way, I think the 20-years-plus experience that we've had  
12 with the Filartiga regime has made it quite clear that  
13 these lawsuits provide tremendous problems for the foreign  
14 policy interests of the United States.

15 And at the same time, in the intervening --  
16 intervening period, if anything, this Court has made it  
17 quite clear what the proper mode of finding a cause of  
18 action is and the proper way to read a jurisdictional  
19 provision.

20 QUESTION: As to your first, the tremendous  
21 problems, how many lawsuits are there of this 1350 nature  
22 and how many have even gone to judgment?

23 MR. CLEMENT: Justice Ginsburg, regrettably, I  
24 don't have the numbers on those.

25 But I think one thing that's important to

1 emphasize is that the case doesn't have to go to judgment  
2 to create potential foreign policy problems for the United  
3 States. And to give you just one example, there's  
4 litigation that's ongoing -- it hasn't gone to judgment.  
5 It's quite preliminary -- in New York right now, where  
6 people are seeking compensation for abuses that occurred  
7 during the apartheid regime in South Africa. Now, the  
8 Government of South Africa itself, of course, has a very  
9 different mechanism for dealing with those issues, the  
10 truth and reconciliation process.

11 And the Government of South Africa has formally  
12 protested at the highest levels that these issues that are  
13 very difficult issues for that government and that  
14 government is dealing with are the subject of litigation  
15 in the United States courts. And I think what you see is  
16 time and time again you have private litigants that may be  
17 very well intentioned but are focused on only a single  
18 issue and they are bringing that issue into the courts,  
19 creating foreign policy problems for the executive branch  
20 which the executive branch then has to try to remedy and  
21 ameliorate.

22 At the same time, in the process of those  
23 lawsuits, you have courts making pronouncements on  
24 principles of international law and customary  
25 international law that may well be at variance with the

1 views of the executive branch or --

2 QUESTION: Has Congress been asked to take a  
3 look at the statute and to amend it or -- or restrict it  
4 in some fashion, 1350?

5 MR. CLEMENT: I'm sure there have certainly  
6 been --

7 QUESTION: Are there bills introduced to do  
8 that?

9 MR. CLEMENT: I don't know that any bills are  
10 pending, but I do think that Congress is certainly fully  
11 able to deal with this situation.

12 QUESTION: Well, I think so.

13 (Laughter.)

14 MR. CLEMENT: Definitely, and -- and -- but I  
15 think when Congress does deal with this situation and  
16 actually provides for a cause of action, that provides a  
17 much better solution to this problem. And I think if I  
18 could point to the Torture Victim Protection Act as an  
19 example of what happened --

20 QUESTION: That's all -- that's a good example  
21 of where Congress took action. I -- I just wonder if it  
22 isn't wise to look at the underlying statutory grounds  
23 relied upon by the Ninth Circuit and deal with it that way  
24 and let Congress have a look at this thing. And I'm sure  
25 Congress would be interested in the views of the Attorney

1 General and others who think it's a concern.

2 MR. CLEMENT: Again, Justice O'Connor, I mean, I  
3 can only repeat that there's nothing that would stop this  
4 Court from resting its decision only on the  
5 extraterritorial authority question and that would  
6 certainly be a significant correction of the law because  
7 the Ninth Circuit has left us --

8 QUESTION: But, Mr. Clement, on that -- on that  
9 point, your point that there must be another Federal  
10 statute enacted creating a cause of action, because this  
11 is purely jurisdictional, I have yet to find any judge  
12 who's taken that position. Even Judge Bork doesn't take  
13 that position.

14 MR. CLEMENT: Well, I think that -- that -- I  
15 don't know that Judge Randolph in his separate opinion in  
16 the Al Odah case expressly -- if you can tell exactly  
17 where he would come down on that. I -- I actually read  
18 his opinion as consistent with the position we're urging,  
19 but I of course may have an interest in doing so.

20 I would say this, though, that I think that if  
21 you read this Court's precedents for dealing with a cause  
22 of action -- in finding a cause of action, there's no  
23 question that the 1350 is applied pursuant to those modern  
24 principles --

25 QUESTION: Well, I understand all the cases

1     since Cort against Ash support you, but we're construing a  
2     statute enacted a long, long time ago, and there was all  
3     sorts of -- of opinion to the effect that there were at  
4     least two or three causes of action that did not need to  
5     be severally created: privacy, protecting ambassadors,  
6     and so forth. You remember the three examples even Judge  
7     Bork recognized. If that's right, then your fundamental  
8     position is -- is totally unsupported by judicial opinion.

9             MR. CLEMENT: Well, with respect, Justice  
10     Stevens, let me take that in a couple of steps. First of  
11     all, I mean, certainly Judge Bork thought that maybe those  
12     original causes of action would be actionable in Federal  
13     court at the time.

14             Now, first of all, to make clear, what the first  
15     Congress did is rather than pass any kind of tort action,  
16     it dealt with those three very offenses against the law of  
17     nations and dealt with them criminally. Now, it may be  
18     that what Judge Bork had in mind is that at the time of  
19     the framing, as a matter of general common law in the pre-  
20     Erie sense, it might have been possible to get into  
21     Federal court and raise those three violations against the  
22     law of nations as a tort action. I don't think, however,  
23     that authority would survive Erie in any event, and I  
24     think it raises some questions of its own.

25             Now, I think you're absolutely right, though,

1 Justice Stevens, to say that the one objection you would  
2 have to applying straightforwardly the principles that  
3 this Court has adopted in cases like Cort against Ash and  
4 Sandoval is that this statute was passed at a much earlier  
5 time and where the -- the enacting Congress may have had  
6 different assumptions in mind.

7 But this Court has made clear that it's not  
8 going to sort of tether its analysis to what assumptions  
9 the enacting Congress might have had in mind. It did so,  
10 of course, in the Sandoval decision. But you did so  
11 yourself, Justice Stevens, in your separate opinion in  
12 California against Sierra Club where you said that it may  
13 very well have been that the Congress in 1890 that passed  
14 the Rivers and Harbor Act probably assumed there would be  
15 a cause of action in court, but you said it was more  
16 important to apply the principles of Cort against Ash in  
17 that case than to try to divine the intent of an enacting  
18 Congress from 100 years earlier.

19 QUESTION: Well, what about the cues that you  
20 get from the Torture Victim Protection Act? When Congress  
21 had 1350 right next to it and there's not a word in -- in  
22 that legislative history, it -- it seems to be a model.  
23 Yes, this is a good thing, but it's -- it's -- we want to  
24 make it really clear that torture is a crime against  
25 humanity and we want to include U.S. citizens as

1 plaintiffs as well. But they didn't say anything  
2 questioning 1350.

3 MR. CLEMENT: Well, Justice Ginsburg, if I could  
4 just make sure that there's one fact that's on the table,  
5 which is you said that they -- that Congress effectively  
6 had the provisions side by side, and I think it is worth  
7 noting that although the Torture Victim Protection Act is  
8 now codified as a note to 1350, that was not a decision  
9 Congress made. That was just a codification decision. So  
10 Congress itself didn't say insert in the code after  
11 1350 --

12 QUESTION: But there was discussion of 1350 by  
13 the proponents of the Torture Victim Protection Act.

14 MR. CLEMENT: There certainly was and I think  
15 that -- that basically the enactment of Congress is --  
16 sort of says nothing about 1350 one way or another. What  
17 I would point to the Torture Victim Protection Act,  
18 though, is a model of why it makes sense to ask Congress  
19 to get involved in creating a cause of action because when  
20 it does, it provides clear direction to the court and also  
21 acts in a way that minimizes tensions with allies because  
22 you're absolutely right to suggest that torture is one of  
23 the most well-established norms of international law.  
24 Yet, notwithstanding that, when Congress addressed the  
25 issue in the TVPA, it provided specific definitions of the

1 prohibited conduct. Then it also provided clear guidance  
2 to the lower courts by providing for a specific statute of  
3 limitations of 10 years.

4 And then, as I also indicated, it -- it put in a  
5 specific statutory exhaustion provision which suggested  
6 that litigants shouldn't rush to United States courts if  
7 the courts in the area where the events actually took  
8 place are open for the claims. I think that last  
9 provision is particularly telling because it shows that  
10 when you take the normal course and insist that Congress  
11 get involved in the process of creating causes of action,  
12 Congress as a political branch with foreign affairs  
13 responsibilities of its own --

14 QUESTION: But, Mr. Clement, if I -- if I  
15 remember, some of the briefs have taken the position that  
16 that's already an aspect of international law, a  
17 requirement that you should first exhaust in the country  
18 where the conduct took place, which would -- would narrow  
19 the scope of the statute if we -- if we adopted that view.

20 MR. CLEMENT: Well, Justice Stevens, there  
21 certainly are international jurists that will argue that  
22 exhaustion principles are a principle of international  
23 law. But I think that's exactly what ends up happening if  
24 you leave these issues to the courts and don't insist on a  
25 cause of action is you leave the courts as a matter of



1 Federal common law, I guess, trying to interpret  
2 international law sources to come up with things like  
3 exhaustion. A statute of limitations I would think would  
4 be even more difficult. Principles of damages. And  
5 they're supposed to do all of that as a matter of Federal  
6 common lawmaking with the only guide they have in the text  
7 is the 33 words in 28 U.S.C. 1350 which, by their terms,  
8 really only address jurisdiction. So I think that would  
9 put the courts in a very difficult position, and I think  
10 in contrast, the Torture Victim Protection Act shows the  
11 virtues of waiting for Congress to take some action before  
12 somebody would get involved in this kind of situation.

13 QUESTION: But in the -- in the --

14 QUESTION: -- on 1350 address the question of  
15 the authority of the DEA agents to make the address, and  
16 if you have time, the Federal Tort Claims provision that  
17 it's governed by events that occur abroad as opposed to  
18 the headquarters doctrine.

19 MR. CLEMENT: Yes, Justice Kennedy, and thank  
20 you.

21 Let me start with the -- the arrest authority  
22 question because, as I said at the outset, the view of the  
23 Ninth Circuit is that there is categorically no arrest  
24 authority abroad, even if a foreign nation consents. And  
25 that really cannot be correct. And I think respondent

1 recognizes that implicitly by not defending that aspect of  
2 the Ninth Circuit ruling, but rather insisting on a rule  
3 that would give arrest authority only with consent.

4           And with respect, though, I think that is not a  
5 workable rule for the Federal courts, and if I could use,  
6 by way of example, the arrest of the individual who's the  
7 convicted killer in the CIA shooting, Mir Aimal Kasi.  
8 This is an individual who was arrested by FBI agents in  
9 Pakistan in 1997. Under the Ninth Circuit's approach,  
10 obviously, this individual could not be arrested by FBI  
11 agents as a categorical matter. But under the approach of  
12 respondent, the Federal courts would have to inquire into  
13 the circumstances surrounding the arrest and to inquire  
14 specifically into whether the Government of Pakistan  
15 consented to the arrest by FBI agents in Pakistan in 1997.

16           Now, I think the prospects for interfering with  
17 sensitive diplomatic relations, not to mention the  
18 difficulty of divining any principles for discerning the  
19 requisite degree of consent, are manifest in both those  
20 cases, and I would suggest that the far better approach is  
21 to read section 878 of title 21, consistent with its plain  
22 terms, to give the DEA the arrest authority for any felony  
23 cognizable under the laws of the United States without  
24 reading in either a territorial limitation or a limitation  
25 based on consent.

1           QUESTION:  Doesn't the Mansfield Amendment tug  
2   the other way?  That was -- when Congress looked at this,  
3   they restricted DEA agents' authority, not granted it.

4           MR. CLEMENT:  With respect, Justice Ginsburg, I  
5   actually think the Mansfield Amendment supports the view  
6   of the United States here, and indeed, under the view of  
7   the Ninth Circuit, it's entirely unclear what the  
8   Mansfield Amendment was supposed to accomplish.  It was  
9   under their view limiting an authority that did not exist  
10  because what the Mansfield Amendment does is put specific  
11  limitations on the authority of Federal agents.  It  
12  applies only to direct arrests, only to foreign police  
13  actions, and only in the context of narcotics control  
14  efforts.  And then even there it provides specific  
15  exceptions for exigencies and the like.  And so I think  
16  what that reflects is that there may be circumstances  
17  where an extraterritorial arrest authority raises concerns  
18  and Congress may react to those, as it did in the  
19  Mansfield Amendment, but the very fact that there is this  
20  specific and tailored limitation on DEA authority suggests  
21  that there must be some broader grant of authority that  
22  includes extraterritorial arrests.

23          QUESTION:  But isn't -- isn't it possible to  
24  read -- and I'm not sure it should be read this way, but  
25  isn't it possible to read the Mansfield Amendment as

1 simply saying DEA agents should not go out in foreign  
2 police raids when the police of the foreign countries make  
3 the raids. Stay out of it. That's one way to read the --  
4 the foreign police action qualification.

5 MR. CLEMENT: That's certainly -- that is one  
6 way you could read it, Justice Souter. And I think  
7 there's two implications from that. One is, of course, if  
8 that's the way you read it, the Mansfield Amendment  
9 certainly doesn't bar the action here.

10 QUESTION: It doesn't -- but it doesn't imply  
11 anything one way or the other.

12 MR. CLEMENT: Right. But here's why I think it  
13 still implies something about the scope of section 878  
14 because section 878 of title 21 is not just the authority  
15 for the DEA to make arrests, it's basically the source of  
16 all their statutory authority for law enforcement efforts.  
17 And I think that even participation in the midst of a  
18 foreign police action, as you were envisioning the  
19 reference in the Mansfield Amendment, is at least a law  
20 enforcement involvement of the DEA. And so I think that  
21 unless 878 authorizes extraterritorial actions by DEA  
22 agents, be it arrests, be it simply carrying a firearm, or  
23 be it engaging in other investigatory activities, then so  
24 too I think the language of the Mansfield Amendment, even  
25 if it limits the very specific kind of law enforcement

1 activity by the DEA, still suggests that 878 by its terms  
2 is not strictly limited to the territory of the United  
3 States.

4 QUESTION: Of course, you get there by assuming  
5 that anything that the DEA does is law enforcement.

6 MR. CLEMENT: That's a fair point, but I think  
7 even if that's a bit of a broad conception, I certainly  
8 think assisting in the context of a foreign police action  
9 should qualify as law enforcement.

10 If I could say just a -- a few things about the  
11 foreign country exemption before I sit down. I think that  
12 there is a very clear error in the analysis of the Ninth  
13 Circuit because this is really a -- a rare case where you  
14 have an arrest that is false and tortious only because it  
15 occurred in Mexico. You have the lower courts recognizing  
16 that the plaintiff is entitled to damages only for the  
17 period he was in Mexico, and every element of the tort  
18 took place in Mexico. Yet, nonetheless, somehow the court  
19 applies this headquarters doctrine to say that the foreign  
20 country exception applies.

21 And I think what that illustrates is that  
22 although the headquarters exception may have been a  
23 helpful gloss on the language of the statute when it was  
24 first developed, as it's been interpreted by the Ninth  
25 Circuit, it becomes a free-floating exception to the -- to

1 the foreign country exception that allows a plaintiff to  
2 skirt the language of the statute simply by alleging any  
3 degree of U.S. involvement or direction.

4 If I could reserve the remainder of my time for  
5 rebuttal. Thank you.

6 QUESTION: Very well, Mr. Clement.

7 Mr. Phillips, we'll hear from you.

8 ORAL ARGUMENT OF CARTER G. PHILLIPS

9 ON BEHALF OF THE PRIVATE PETITIONER

10 MR. PHILLIPS: Mr. Chief Justice, and may it  
11 please the Court:

12 I guess I'd like to begin, Justice O'Connor,  
13 with your question about whether or not this is an issue  
14 that the Court ought to -- the -- the underlying question  
15 of the meaning of the section 1350 is an issue the Court  
16 ought to resolve as opposed to the narrower --

17 QUESTION: Or whether we have to.

18 MR. PHILLIPS: Well, you clearly don't have to,  
19 and -- and certainly Jose Francisco Sosa would be  
20 perfectly content to have the judgment of the court of  
21 appeals reversed on the ground that the arrest here was  
22 neither arbitrary nor the detention prolonged in a way  
23 that would no -- under no circumstances violate the law of  
24 nations.

25 But the truth is, as one of the amicus briefs

1 for the respondents points out, there are at least 35  
2 cases that they cite in their briefs that have been filed  
3 under section 1350. Those causes of action involve, each  
4 one, numerous individual defendants. There is a  
5 significant reason I think for this Court to try to  
6 provide some additional guidance to the lower courts with  
7 respect to the meaning of section 1350, particularly when  
8 the rules of construction, as Justice Stevens quite  
9 rightly pointed out, so clearly point in a particular  
10 direction. This is a purely jurisdictional statute. It  
11 says it in so many terms.

12 The only language that the respondent embraces  
13 as suggesting that it's not purely jurisdictional is the  
14 word violation, a word this Court specifically recognized  
15 in Touche Ross is not a rights-creating term, but instead  
16 again merely provides jurisdiction. This Court has  
17 repeatedly held that when you have merely jurisdiction,  
18 you do not imply a cause of action. That's the -- the  
19 Montana-Dakota Utilities decision of the Court. Obviously  
20 that's embedded in Sandoval.

21 QUESTION: Well, there are indications early in  
22 the country's history that it was viewed differently at  
23 the time of its adoption, and the -- an Attorney General  
24 early on took that view. It -- it's not easily answered.  
25 I -- I can understand how with the recodification where it

1     then is put in with other jurisdictional sections that it  
2     -- it looks somewhat different, but it's had a pretty long  
3     history.

4             MR. PHILLIPS: But -- but, Justice O'Connor --

5             QUESTION: And it's hard to ignore all that.

6     And it's so easily changed by Congress if indeed it is a  
7     problem.

8             MR. PHILLIPS: Well, I think the presumption  
9     ought to go the other way is that to the extent that the  
10    lower courts have created a problem, it would be incumbent  
11    upon the Court to try to fix that problem if that's an  
12    available option --

13            QUESTION: You agree it's easily changed by  
14    Congress?

15            MR. PHILLIPS: I'm sorry?

16            QUESTION: You agree it's easily changed by --

17            MR. PHILLIPS: Well, I don't think anything is  
18    easily changed by Congress these days.

19            (Laughter.)

20            MR. PHILLIPS: But -- but, Justice O'Connor,  
21    your -- your point brings to mind, frankly, Justice  
22    Frankfurter's observations in the Romero case about  
23    comparing the historical efforts here to archaeology and  
24    the -- and as one who has now spent the better part of the  
25    last 6 months on what struck me as a historical dig that



1 accumulated a whole lot of information, virtually none of  
2 which remotely provides me with any insights at to what  
3 the Congress of 1789 really had in mind at the end of the  
4 day, I think the Court would do extremely well here to go  
5 back to the first principles of statutory interpretation.

6 I'm sorry, Justice O'Connor.

7 QUESTION: It probably had in mind problems of  
8 piracy.

9 MR. PHILLIPS: Well, it clearly had in mind  
10 problems of piracy, but as even Blackstone made clear,  
11 problems of piracy are matters of public concern. They  
12 are not matters of private concern. And while it may well  
13 be that Congress did have in mind down the road that there  
14 may be subsequent enactments that would, in fact, invoke  
15 section 1350 as an exercise of jurisdiction --

16 QUESTION: And then we have the case of the  
17 attack on the early diplomat and so on. I mean, it --  
18 it's had a long history.

19 MR. PHILLIPS: Well, first of all, there's an  
20 interesting gap in that history because you go up till  
21 about 1807 and then nothing happens until 1982. So it's a  
22 little difficult to think that there are a whole lot of  
23 historians out there thinking that there was a clear basis  
24 for a cause of action tapping in to the law of nations and  
25 to those kinds of rights.

1 QUESTION: Maybe we didn't assault any  
2 ambassadors during that later period.

3 (Laughter.)

4 MR. PHILLIPS: I certainly hope we didn't.

5 QUESTION: But, of course, I -- most references  
6 to international law were in admiralty cases where there's  
7 jurisdiction anyway.

8 MR. PHILLIPS: To be sure, absolutely. And that  
9 -- that's why --

10 QUESTION: Yes, but not in the ambassador cases.

11 MR. PHILLIPS: No.

12 QUESTION: It was pretty clearly, it seems to  
13 me, one of the things that the statute would have covered  
14 for the assault of the French ambassador.

15 MR. PHILLIPS: It's not -- well, it's not 100  
16 percent clear to me because the -- the problem you have  
17 there is that it would clearly have been a public right  
18 and it was -- and, you know, the Congress in 1790  
19 immediately passes a statute that -- that imposes criminal  
20 sanction for this. And indeed, Justice O'Connor, even in  
21 the -- even in the Pennsylvania case where it arose out of  
22 common law, it was a -- it was criminal action that was  
23 brought against the attacker on the -- on the ambassador.  
24 It was not a civil action. No one sought damages.

25 QUESTION: But, Mr. Phillips --

1                   MR. PHILLIPS: This is a very unknown  
2     enterprise.

3                   QUESTION: One of the -- one of the things that  
4     I keep bumping up against -- and I want to be sure you get  
5     an opportunity to comment on it -- that -- 1980, I guess  
6     it was, the Second Circuit got into the act and decided  
7     that case. So we've had 25 years, and we had a bunch of  
8     opinions. And I don't think a single Federal judge has  
9     taken the position that you're advocating.

10                  MR. PHILLIPS: Well, I don't -- I don't -- I  
11     don't disagree with it. I think that's absolutely true.  
12     On the other hand, I don't think a whole lot of those  
13     judges gave quite as much thought or attention to this  
14     issue as the litigants before this Court have in this  
15     particular case. And the briefing here is obviously  
16     extraordinary both in its breadth and depth. And at the  
17     end of the day -- and -- and I don't think anybody tried  
18     to mine the historical materials in quite the same  
19     intensity as we have coming here.

20                  And as I said --

21                  QUESTION: I thought -- I thought you'd probably  
22     have a -- a right to recover damages for piracy, wouldn't  
23     you have? I mean, wouldn't they have thought in 1789 you  
24     did?

25                  MR. PHILLIPS: Well, it's not clear, but if you

1 would have, it would have been under admiralty  
2 jurisdiction.

3 QUESTION: Well, admiralty and maritime law then  
4 I thought were viewed as a brooding omnipresence.

5 MR. PHILLIPS: They were. They were.

6 QUESTION: They weren't the law of Athens. They  
7 weren't the law of Constantinople. They weren't the law  
8 of Rome. They were the law of nations.

9 MR. PHILLIPS: Well --

10 QUESTION: And that -- that -- you can find lots  
11 of quotations along those lines.

12 So if in fact that was so then and you're  
13 looking for a modern counterpart, what's wrong with what  
14 the European Commission said? I'd be interested in having  
15 your views on that brief.

16 MR. PHILLIPS: Well, let -- let me answer the  
17 first question because the difference between  
18 incorporating the law of nations from the -- into  
19 admiralty jurisdiction, it had a tradition of 1,000 years.  
20 The idea of interpreting the law of nations or  
21 incorporating the law of nations into section 1350 or its  
22 precursor back then where it only benefits aliens seems to  
23 me a quite improbable undertaking by Congress in 1789.

24 QUESTION: It would not be improbable in a world  
25 where law was a brooding omnipresence in the sky to think

1     that we preserve it in the case of admiralty, maritime,  
2     and certain instances of international law. But Erie  
3     sends it to the states once they decide to make that  
4     separation. That's an ex post event. That doesn't cast  
5     an idea in the minds of Congress. So if you have Congress  
6     ex ante thinking, of course, this is international, as  
7     they thought maritime law was, then our task is to try to  
8     translate that into modern terms. And that brings me back  
9     to the European Commission.

10           MR. PHILLIPS: But I -- I -- the difficulty I  
11     have with that, Justice Breyer, is I think this Court has  
12     rebelled from the idea that it's going to incorporate a  
13     massive brooding omnipresence --

14           QUESTION: Not massive. Very limited.

15           MR. PHILLIPS: But, see, I don't think --

16           QUESTION: That's why I keep bringing up the  
17     European Commission.

18           MR. PHILLIPS: But, see, that's my problem with  
19     that -- with that argument because it doesn't -- I don't  
20     see what the limitation is, Justice Breyer. What we're  
21     dealing with is if you're saying the law of nations,  
22     customary international law, whatever that means -- and we  
23     know from the Ninth Circuit it doesn't have to be anything  
24     that the United States itself embraces. These are rules  
25     that are imposed upon us under these -- under these

1     circumstances. It would seem to me that if you're going  
2     to bring it into the modern era, you ought to bring it in  
3     with the recognition that there are core separation of  
4     powers concerns in this context that ought to -- ought to  
5     caution hesitation in exactly the same way --

6             QUESTION: All right. I agree with you about  
7     that.

8             MR. PHILLIPS: -- that the federalism principle  
9     was --

10            QUESTION: So what -- what is -- what I got out  
11     of that brief -- and I refer to one, and I want to get  
12     your views on that -- is it wouldn't be difficult to have  
13     a limited cause of action, try to find the counterpart,  
14     and say, of course, if Congress preempts the field, as  
15     maybe it did with torture, that's out. Or if Congress  
16     implicitly is hostile to the cause of action, that's out.  
17     And if Congress is neutral and the State Department comes  
18     in and runs through any one of a set number of defenses,  
19     including political question, that's out. And there we  
20     have -- what's left is a core of basic human rights  
21     violations that's been internationalized, that's  
22     consistent with international law as applied in a lot of  
23     places and avoids the political problem. That's what I'm  
24     looking to shape, and I want your view on that because we  
25     have a brief that tries to do it.

1           MR. PHILLIPS: But that brief assumes that 1350  
2 does more than provide jurisdiction.

3           QUESTION: Yes, that's correct.

4           MR. PHILLIPS: It assumes that there is a cause  
5 of action.

6           QUESTION: That's correct. That's why -- that's  
7 why if I don't accept your first argument, can we achieve  
8 your practical objectives by following that approach?

9           MR. PHILLIPS: Well, to be sure. There -- I  
10 mean, that would take you back to, I think, Justice  
11 O'Connor's question which is, could you resolve this  
12 particular case by reference to an understanding of the  
13 law of nations that -- that rejects any notion that this  
14 was an arbitrary act or that the detention here was  
15 prolonged within the meaning of the Restatement (Third) of  
16 Foreign Relations? And -- and to be sure, that's a  
17 narrower basis for deciding and that is the focus of the  
18 commission's brief.

19           QUESTION: It may also --

20           MR. PHILLIPS: We don't have any quarrel with  
21 that on --

22           QUESTION: It may also be correct.

23           MR. PHILLIPS: Well, to be sure, it's correct.

24           QUESTION: I mean, you're not -- you're not  
25 saying that's a wrong interpretation, are you?

1                   MR. PHILLIPS: No, no. Absolutely not. And if  
2     you're in that world and you're looking at those -- at  
3     those circumstances, you obviously would have to take a  
4     very narrow approach in -- in terms of trying to --

5                   QUESTION: And presumably if there is some cause  
6     of action alleged in any of these actions that have been  
7     or might be filed, that deal with something that is  
8     covered basically by a treaty that Congress has said is  
9     non-self-executing, I assume that would displace any  
10    common law background.

11                  MR. PHILLIPS: Well, I think that you raise an  
12    important point there which is the parallelism between the  
13    treaty prong and the law of nations prong of the statute  
14    because if, as -- as Judge Bork explained in his separate  
15    opinion, the thing that disturbed him the most about this  
16    was the suggestion that somehow on behalf of aliens, you  
17    would create a right under the treaty that you would --  
18    that -- that citizens would never have had the right to  
19    because it wouldn't be self-executing. It seemed quite  
20    improbable that Congress would have intended that. So by  
21    parity of reasoning, why would Congress have wanted to  
22    create this kind of access into a brooding omnipresence of  
23    law that is essentially very difficult to confine?

24                  And I -- and I go back to Justice Breyer's point  
25    which is, to be sure, there are ways to try to narrow



1     those rules. My position is you do better not to try to  
2     go down that path in the first place. You would do better  
3     to recognize that this is a purely jurisdictional statute  
4     and thereby force Congress to look in the future at  
5     statutes like the Torture Victim Protection Act.

6             QUESTION: Okay. Mr. Phillips, let's -- let's  
7     assume I accept your argument that there are good reasons  
8     not to invite the -- the -- today's brooding omnipresence  
9     into court without something more from Congress, that  
10    there are good reasons to be concerned about separation of  
11    powers problems. Assume also that I am convinced or the  
12    Court is convinced that at the time the statute was  
13    passed, there was an understanding that there were certain  
14    offenses to which the jurisdictional provision would --  
15    would provide access for litigation, piracy offenses and  
16    things like that. How do I distinguish today's situation  
17    from yesterday's situation and hold your way without being  
18    inconsistent with what I take it the understanding was at  
19    the time in incorporating some offenses in a common law  
20    kind of way?

21            MR. PHILLIPS: Well, I think the easiest way to  
22    ensure consistency there would be to insist that there be  
23    a -- a real clarity, both that the United States is --

24            QUESTION: No, but that -- that then just takes  
25    you to Justice Breyer. He says --

1                   MR. PHILLIPS: Well, no. Then that's my answer  
2 to your question.

3                   QUESTION: Okay.

4                   MR. PHILLIPS: Because I think in that world --

5                   QUESTION: You're saying the only way to get  
6 where I have suggested we might go is Justice Breyer's  
7 way?

8                   MR. PHILLIPS: No. I -- I don't know that it's  
9 the only way, but it is the simplest way to get to that  
10 kind of consistency if you accept the premise that  
11 Congress necessarily believed in 1789 that there would be  
12 a cause of action created from language discussing merely  
13 jurisdiction.

14                  QUESTION: Let me -- well, I'm not -- no. I'm  
15 not suggesting that it -- that the cause of action was  
16 created from the language discussing jurisdiction. I am  
17 assuming that the cause of action was assumed to be out  
18 there and that the jurisdictional provision opened the  
19 door to the courthouse to get the cause of action in.

20                  MR. PHILLIPS: Can -- can I challenge that  
21 assumption --

22                  QUESTION: Yes, yes.

23                  MR. PHILLIPS: -- Justice Souter? Because if  
24 you look at the historical record and go back to the 1781  
25 Continental Congress saying to the States, there is no

1 brooding omnipresence, we need you, States, to go out,  
2 take action to deal with ambassadors to protect them --

3 QUESTION: Is it clear that there was nothing in  
4 the absence of -- of action by the States? Or is it clear  
5 that there were only a -- let's say, a few and rather  
6 limited causes of action, those largely arising -- well,  
7 we have the ambassador case. We -- we have offenses at  
8 sea.

9 MR. PHILLIPS: But -- but -- the -- the -- I --  
10 I think there are no causes of action because the -- if  
11 you take seriously -- why -- why would the Continental  
12 Congress say to the States, enact a statute to protect  
13 ambassadors if ambassadors are otherwise being protected?  
14 Why does Connecticut then go forward and enact a law that  
15 not only provides criminal protection for the ambassadors  
16 but goes -- goes beyond that and provides civil remedies,  
17 liability and damages for attacks on ambassadors, if there  
18 is this brooding omnipresence?

19 The point is -- my -- my basic point is I don't  
20 think the historical record will demonstrate to you at all  
21 that these causes of action existed. And therefore, this  
22 is not a simple instance of the courts -- of the Congress  
23 trying to tap in to a body of law. What it was doing was  
24 creating a jurisdictional basis to be filled in in the  
25 future. In that sense, I don't think the Congress of 1789

1     came to the table to deal with this issue dramatically  
2     differently than the Congress today would -- would deal  
3     with it. They enact jurisdictional provisions all the  
4     time. To be sure, 1331 has eliminated the need for a lot  
5     of this.

6             But the reality is you -- you create the  
7     jurisdiction and then you fill the vessel. And this Court  
8     has got a -- you know, an obviously long line of -- of  
9     opinions in which it's recognized jurisdiction doesn't  
10    create Federal common law rules, jurisdiction doesn't  
11    create a right of action. It simply creates jurisdiction.  
12    And if this Court goes back to that core principle as the  
13    method for trying to interpret section 1350, it will avoid  
14    all of the problems and then force Congress to take the  
15    action that I think is important here.

16            The -- the Torture Victim Protection Act has a  
17    statute of limitations, has an exhaustion requirement, has  
18    a definition of torture. Congress wasn't implementing  
19    section 1350 there. It was implementing its obligations  
20    under international agreements dealing with the question  
21    of torture.

22            My guess is we have similar kinds of provisions  
23    that are out there that we probably ought to be trying to  
24    find causes of action for, and Congress should take those  
25    up. But what shouldn't happen is to allow the courts

1 exercising what I submit is an extraordinary Federal  
2 common law power to go out, find causes of action, and  
3 then proceed to define all of their elements, all of their  
4 defenses without the benefit of any guidance, which is  
5 precisely how you end up in a situation today where the  
6 Ninth Circuit has said that in a situation where a Mexican  
7 national assists the United States to -- to enforce an  
8 arrest warrant, and the circumstances presented in this  
9 case that he's not only engaged in an arbitrary act, but  
10 that the detention is -- is wrongful in its own right, not  
11 -- even though there's not a shred of evidence that the  
12 United States would have embraced that view with respect  
13 to its own obligations as a matter of international law.  
14 Once you open this door --

15 QUESTION: Well, we can deal with that issue.

16 MR. PHILLIPS: And you should deal with that  
17 issue, but -- but, Justice O'Connor, I think you should  
18 try to deal with the broader issue because there are just  
19 too many of these cases out there creating too much havoc  
20 for no good reason, if I'm right, that the Congress in  
21 1789 did not have in mind something anywhere -- anything  
22 like what we've seen since 1982. And if it's just as easy  
23 for this Court then to go back to first principles of  
24 statutory interpretation based on the language of the  
25 statute and say enough is enough.

1                   If there are no --

2                   QUESTION: They did use the word tort, which is  
3 -- was -- was surprising to me that they used it at that  
4 early date. That's -- that's one of my problems I have  
5 with your position.

6                   MR. PHILLIPS: They did use the word tort. It's  
7 unfortunately, obviously having spent, as I said, a long  
8 time in my historical dig, I haven't been able to figure  
9 out why they pulled out the word tort under those  
10 circumstances. It doesn't really have an analog. It  
11 would have been more sensible if they had -- had used -- I  
12 mean, they didn't actually need the term limit. I -- I'm  
13 sure it's a term of limitation. I think what they were  
14 concerned about were -- were debts. I think that's what  
15 they were worried about. They didn't want aliens to be  
16 coming in and trying to -- trying to deal with debts.  
17 They were -- they were trying to stay away from that.  
18 They were worried, obviously, at the end of the day with  
19 injuries.

20                   But -- but I agree with you, Justice Kennedy,  
21 it's an odd choice of words, given how little law was  
22 developed on torts generally and how no law was developed  
23 under the law of nations involving torts specifically.

24                   I've already taken up enough of your time.

25                   QUESTION: Thank you, Mr. Phillips.

1                   Mr. Hoffman, we'll hear from you.

2                   ORAL ARGUMENT OF PAUL L. HOFFMAN

3                   ON BEHALF OF THE RESPONDENTS

4                   MR. HOFFMAN: Mr. Chief Justice, and may it  
5 please the Court:

6                   Let me start with the meaning of the alien tort  
7 statute. It's our position, as you know from the briefs,  
8 that -- that Congress meant what it said, that Congress  
9 actually decided in 1789 to pass a statute that allowed  
10 aliens that had tort claims that -- involving the  
11 violation of the law of nations to bring them in Federal  
12 court, and that by using the word tort, what the -- the  
13 Founding Fathers were referring to was a body of common  
14 law that was well known to be part of the law in the  
15 United States during the colonial days and at that time.

16                  QUESTION: May I ask --

17                  QUESTION: How do you -- go ahead.

18                  MR. HOFFMAN: I'm sorry. I said the --

19                  QUESTION: May I ask -- may I ask this question  
20 as a matter of history because your right on the point  
21 now? Is there anything in the early history that gives  
22 even the slightest suggestion that Congress wanted to  
23 legislate with respect to anything that did not happen in  
24 the United States or on the high seas?

25                  MR. HOFFMAN: Well, I think that the -- the

1 kinds of law of -- law of nations violations at the time  
2 would have included piracy, which clearly -- in terms of  
3 another country, I mean, it's certainly possible that a --  
4 an assault on an ambassador could have taken place in  
5 another country.

6 QUESTION: Yes, but the only ones they knew  
7 about had taken place in the United States.

8 MR. HOFFMAN: Well, the ones that they were most  
9 concerned about was the 1784 Marbois incident and the one  
10 in 1788, the Dutch ambassador in New York City, were the  
11 ones most on their mind.

12 QUESTION: They certainly would not have been  
13 concerned about an assault on the -- say, the English  
14 ambassador in Paris by a Frenchman.

15 MR. HOFFMAN: Well, that's not entirely clear, I  
16 mean, because if there was a -- one of the things that was  
17 before them was the transitory tort doctrine. And the  
18 transitory tort doctrine, which this Court has recognized  
19 dates back at least as -- as far as *Mostyn v. Fabrigas*,  
20 which is a 1774 Lord Mansfield opinion, which involves  
21 ironically a false imprisonment claim against a government  
22 official which took place outside the territory of England  
23 and which was found to be cognizable in common law tort  
24 within the -- the courts of England. And so the --

25 QUESTION: Well, you wouldn't need the -- the



1 law of nations for a transitory tort. I mean, if it's  
2 a --

3 MR. HOFFMAN: Excuse me?

4 QUESTION: You -- you don't need the law of  
5 nations to sue on a transitory tort.

6 MR. HOFFMAN: No, of course, not.

7 QUESTION: If it was a tort in the country where  
8 it was committed, you -- you could sue on it elsewhere.

9 MR. HOFFMAN: No. And in fact, I think that one  
10 of the main purposes of the alien tort statute was to  
11 provide a Federal forum for those claims when they came  
12 within the United States.

13 QUESTION: If -- if there was this background of  
14 -- of understood common law that you say, how do you  
15 explain the 1781 action of the Continental Congress which  
16 is concerned about the fact that -- that there's no  
17 redress for -- for assault on ambassadors, among other  
18 things?

19 MR. HOFFMAN: Well --

20 QUESTION: And they asked the States, do  
21 something about it.

22 MR. HOFFMAN: Well, certainly the --

23 QUESTION: If that -- that was part of the  
24 understood common law, what is the problem?

25 MR. HOFFMAN: Well, one of the -- one of the --

1 first of all, Longchamps is one response to that in the  
2 sense that in Pennsylvania they didn't need a statute.  
3 They didn't pass a statute and -- and the -- the courts in  
4 Pennsylvania understood that the law of nations was part  
5 of their common law.

6 QUESTION: Yes, but that goes against the notion  
7 that there was an understood common understanding that was  
8 the background. It was understood one way in  
9 Pennsylvania. It was understood another way by -- by the  
10 Continental Congress.

11 MR. HOFFMAN: No. I think what -- what -- the  
12 way we would interpret the 1781 resolution is that the  
13 1781 resolution was more a function of the Continental  
14 Congress' inability to enforce the law of nations on  
15 behalf of the Nation under the Articles of Confederation.  
16 And so they had no way to respond to any incident,  
17 including the Marbois incident after that resolution.  
18 Now, they did --

19 QUESTION: Then why did they pass a resolution  
20 saying to the States, enforce the common law?

21 MR. HOFFMAN: Well, what they did is they asked  
22 the -- the States to enforce the law of nations. And  
23 Connecticut passed that particular statute in order to do  
24 it. Other States did not act in response to that, but  
25 that's not to suggest that they didn't decide that they

1 already had adequate remedies.

2           Moreover, the resolution did more than just ask  
3 the States to enforce the law of nations. It also  
4 provided a new -- which was not a common law thing -- an  
5 indemnity for the United States if the United States had  
6 to do something to take up the slack for the States.

7           And so from our standpoint, what -- what the --  
8 the 1781 resolution really does is that is the -- the step  
9 is from 1781, feeling completely frustrated and not able  
10 to enforce the law of nations, coming to the Constitution  
11 where there's lots of evidence that the Founding Fathers  
12 believed that we had to as a Nation enforce the law of  
13 nations, having incidents like the Marbois incident and  
14 the -- the attack on the ambassador in New York right  
15 before them, deciding in the alien tort statute to make  
16 those claims available.

17           Now, what -- what the Government and -- and  
18 Petitioner Sosa want the Court to believe is that having  
19 gone through the trouble of expressing to the world, to  
20 the people, in terms of the -- that -- that we would as a  
21 Nation enforce the law of nations, that then the Congress  
22 just didn't do it because basically Congress didn't do  
23 anything else to enforce the torts in violation of the law  
24 of nations clause of the Judiciary Act of 1789.

25           QUESTION: Part -- part of the problem I have

1 with -- with your -- your proposal is that it leaves it up  
2 -- it leaves it up to the courts to decide what the law of  
3 nations is. And -- and the Ninth Circuit here derived a  
4 law of nations principle from, among other things,  
5 treaties that we had refused to sign, international  
6 agreements that we had reserved against. I -- I find that  
7 a -- a serious interference with the ability of -- of the  
8 political branches to conduct our foreign affairs.

9 MR. HOFFMAN: Well, there are two -- I have two  
10 responses, Justice Scalia, to that question.

11 On the first one, in terms of whether the law of  
12 nations is too indeterminate -- boundless I think is the  
13 word that's used in the petitioner's brief -- this Court  
14 has affirmed at least in -- on two occasions that I'm  
15 aware of, in U.S. v. Smith and in Ex parte Quirin, the  
16 fact that Congress can easily by reference incorporate the  
17 law of nations and that it is not indeterminate enough to  
18 justify a death sentence in the -- against the pirate in  
19 the United States v. Smith in 1820 and 120-some-odd years  
20 later against Nazi saboteurs in Ex parte Quirin. The  
21 Court -- it is perfectly permissible for the Congress,  
22 particularly in 1789, to incorporate by reference what  
23 lawyers at that time knew to be the law of nations. It's  
24 not -- Congress doesn't have to exercise its --

25 QUESTION: Those -- those are pretty polar

1 instances, piracy and -- and sabotage in -- in time of  
2 war. We're talking here about other matters that are not  
3 -- not at all polar.

4 MR. HOFFMAN: Well, in the -- in the --

5 QUESTION: And I -- sure, I can tell you some  
6 things that everybody would agree is against the law of  
7 nations, but there are a lot of things in between that the  
8 European Union may think is bad and we may not think is  
9 bad.

10 MR. HOFFMAN: Well, but actually I think that  
11 that is -- would not be a correct view of -- either of  
12 what the courts did or what the courts ought to do. In  
13 fact, there are a relative handful of cases under the  
14 alien tort statute in the last 25 years in which there  
15 have been findings about violations of the law of nations.  
16 They have tended overall to involve claims of torture,  
17 genocide, war crimes, crimes against humanity, clearly  
18 norms that the United States has supported from Nuremberg  
19 on down.

20 QUESTION: But that's not your case.

21 MR. HOFFMAN: Well, you're right, Chief Justice  
22 Rehnquist. That is not my case.

23 But my argument about why this is arbitrary  
24 arrest and detention is, number one, there is a core  
25 arbitrary arrest and detention norm that an -- that an

1 arrest and detention can't happen without legal authority.

2 QUESTION: Well, there was legal authority here.

3 The -- the -- he was indicted by a grand jury.

4 MR. HOFFMAN: Well, he was indicted by a grand  
5 jury and there was an arrest warrant that was limited to  
6 the territorial boundaries of the United States.

7 QUESTION: Well --

8 MR. HOFFMAN: There was no authority to arrest  
9 him in Mexico.

10 QUESTION: -- yes, but I -- I think there's a  
11 good argument that section 878 has extraterritorial  
12 application, that DEA agents are not prevented from  
13 carrying out their duties across our borders.

14 MR. HOFFMAN: Well, I think that the -- the  
15 distinction -- and -- and -- that needs to be made on that  
16 is that it is clear that the Congress was aware, as we all  
17 are aware, that the Drug Enforcement Administration has  
18 involved in activities in other countries of a variety of  
19 activities.

20 QUESTION: Well, like in that case of --

21 MR. HOFFMAN: They're supportive.

22 QUESTION: -- United States v. Bowman dealing  
23 with a ship and -- and exercise of criminal law  
24 enforcement outside our borders and we thought there was  
25 in that case no presumption against extraterritoriality.

1 MR. HOFFMAN: Well, that's --

2 QUESTION: And I think there may well not be in  
3 this DEA context as well.

4 MR. HOFFMAN: The -- the -- I hope to persuade  
5 you otherwise on that point. But the -- the distinction I  
6 would draw, first of all, is that the fact that the DEA is  
7 involved in some activities abroad doesn't mean that  
8 Congress intended that any DEA officer or employee had  
9 worldwide arrest authority at their discretion.

10 QUESTION: No, but we certainly -- in Bowman we  
11 said that the Coast Guard could enforce revenue laws --

12 MR. HOFFMAN: Sure.

13 QUESTION: -- outside our borders, and very  
14 likely a DEA agent can enforce our laws beyond our  
15 borders.

16 MR. HOFFMAN: Bowman -- Bowman was about  
17 jurisdiction to proscribe. And I think the -- the  
18 Government relies on Maul as the case for -- on the  
19 jurisdiction to enforce. And -- and the Maul case is very  
20 interesting actually because what it does is it says that  
21 the Coast Guard can be engaged in activities on the high  
22 seas which are extraterritorial, but they're not within  
23 the territory of another state.

24 And in fact, the -- the language in Maul is very  
25 clear to talk about the law of nations and the

1 restrictions on the ability of the Coast Guard to do  
2 things. They say they're not at issue in that case  
3 because the high seas is a place where that kind of  
4 authority can be maintained without any conflict with any  
5 other nation or without any conflict with -- with the law  
6 of nations. What they -- they were also dealing with a  
7 U.S. ship and a -- and a U.S. citizen, and so there was no  
8 even issue about whether they had the authority on the  
9 high seas to seize a foreign-flagged ship.

10 QUESTION: How can you read the statute to  
11 include the one and not include the other? I mean, it --  
12 it doesn't -- it doesn't slice the bologna that thin. It  
13 just says they have authority to enforce the laws. Now,  
14 if -- if you say that they can't arrest in Mexico, I  
15 assume they can't investigate in Mexico. I don't see how  
16 you can read the --

17 MR. HOFFMAN: I don't think that it -- I don't  
18 think that --

19 QUESTION: How can you read the statute to  
20 permit the one but not permit the other?

21 MR. HOFFMAN: Well, I don't think that it  
22 follows that -- that you have to assume that Congress  
23 intended that -- that entire statute had to have complete  
24 extraterritorial effect.

25 Now, but there's an additional principle other



1     than the presumption against extraterritoriality, which  
2     would slice it one way or the other perhaps, although I  
3     think what the Ninth Circuit said is that we're talking  
4     about extraterritorial arrest here and that provision and  
5     whether that's extraterritorial both in terms of the  
6     language of the statute and the background of the statute,  
7     the background of -- of cooperative activities, not  
8     activities in violation of the law of nations, but --

9             QUESTION: Tell me what language could possibly  
10     allow you to draw that -- that distinction in the text of  
11     the statute. There's no language that allows you to do  
12     that --

13            MR. HOFFMAN: Well, the --

14            QUESTION: -- between arrest and investigation.

15            MR. HOFFMAN: I think that the difference would  
16     be that the Congress -- one of the arguments that the  
17     Government is making, because they don't -- there's  
18     nothing in the -- in the statute that tells you that  
19     arrest authority is extraterritorial either. It doesn't  
20     say anything. It's boiler plate authorization language.  
21     Right?

22            QUESTION: Right.

23            MR. HOFFMAN: And -- and under the Government's  
24     theory, in fact in their reply brief, they say that the  
25     citizens arrest statute in California is the same to

1 section 878, which means that 36 million people in -- in  
2 the State of California can engage in extraterritorial  
3 arrests too.

4 QUESTION: I didn't like that --

5 MR. HOFFMAN: And so there has -- there have to  
6 be some other limitations and some other inquiries --

7 QUESTION: Okay. And you said -- you said you  
8 had another limitation and a further principle.

9 MR. HOFFMAN: Yes.

10 QUESTION: What's the second principle?

11 MR. HOFFMAN: Let me -- the -- the other  
12 limitation -- the other -- well, there are two really.  
13 One is the Mansfield Amendment, which we have laid out in  
14 our brief. And basically our position is that what the  
15 Mansfield Amendment means is that the DEA was  
16 specifically --

17 QUESTION: Well, look, there -- that amendment  
18 refers to foreign police action. There wasn't any such  
19 here.

20 MR. HOFFMAN: But in the -- on the Government's  
21 theory --

22 QUESTION: None. I don't see how it falls  
23 within that at all.

24 MR. HOFFMAN: But in the Government's theory,  
25 what that would mean is that if -- if the Government

1 wanted to arrest a drug trafficker in Mexico and they --  
2 they would be barred by the Mansfield Amendment from  
3 actually being involved in that arrest, even participating  
4 in it unless the ambassador to Mexico approved it under  
5 the -- the rules, but under their theory, they could  
6 actually hire the people that they hired in this case to  
7 arrest the trafficker. Now, I don't -- that's -- but  
8 that's what they're saying. And I -- I --

9 QUESTION: What does the term direct mean?

10 MR. HOFFMAN: Well, I -- direct -- what -- what  
11 happened in this case was certainly directly effecting the  
12 arrest. What the -- what the DEA officials in this case  
13 did is they directed that he be arrested.

14 QUESTION: Well, in that sense every arrest is a  
15 direct arrest. There's no such thing as an indirect  
16 arrest I suppose on that theory.

17 MR. HOFFMAN: Well, I -- I think what the --  
18 what the difference --

19 QUESTION: Doesn't direct refer to the -- to the  
20 actions of the agents?

21 MR. HOFFMAN: But I think what the difference  
22 was is the Mansfield Amendment was broader than just  
23 arresting. The Mansfield Amendment came out of a trip  
24 that Senator Mansfield took to Thailand where he was  
25 concerned about the -- the fact that DEA agents were --

1     were even in any operations with foreign law enforcement  
2     and they -- he thought that that caused problems to our  
3     foreign relations and -- and the exercise of law  
4     enforcement authority in other countries.

5             Now, that was --

6             QUESTION:  If that was so, why didn't he just  
7     eliminate from this as part of any foreign police action?  
8     Why is that phase in there?

9             QUESTION:  Yes.

10            MR. HOFFMAN:  Well, but the thing is from our  
11     standpoint, I mean, this is a foreign -- this -- this is a  
12     police action in a foreign country.

13            QUESTION:  Oh, no, no, no, no.

14            QUESTION:  But that's not --

15            QUESTION:  You -- you don't think foreign police  
16     means foreign police?

17            (Laughter.)

18            MR. HOFFMAN:  I --

19            QUESTION:  You -- you think it's foreign police  
20     action.

21            MR. HOFFMAN:  I really think that -- that the --  
22     the intent of the Mansfield Amendment was not to allow DEA  
23     agents to get involved in arrests that caused problems for  
24     our foreign relations.  And that's exactly what this  
25     arrest did.

1 QUESTION: Okay. You had --

2 QUESTION: Oh, I think you have to look very  
3 closely at that language and -- and I think it may well  
4 not fit this case.

5 MR. HOFFMAN: Well, the other -- the other  
6 principle, though, which I think is the one that -- that I  
7 think clearly applies to this case is -- is the principle  
8 that statutes need to be interpreted to be consistent with  
9 our international law obligations, the Charming Betsy  
10 principle. And -- and there, even in the Maul case, the  
11 -- the Maul Court was certainly aware of the fact that  
12 there were limits in the international law about the  
13 ability to enforce our law extraterritorially.

14 QUESTION: You -- you had -- you told me you  
15 were going to give me two more principles.

16 MR. HOFFMAN: That was the --

17 QUESTION: One was Mansfield. What -- what's  
18 next?

19 MR. HOFFMAN: This was it. The Charming Betsy  
20 is number two.

21 QUESTION: Okay.

22 MR. HOFFMAN: Sorry.

23 But -- but that's the other principle, and I --  
24 I think the one that -- that probably is most applicable  
25 to the situation is the principle that you should presume

1     that Congress did not intend to authorize violations of  
2     international law, which is what occurred in this case.  
3     And whether that's --

4             QUESTION:  They did it.  I mean, that's --  
5     that's the -- the two things that maybe you're going to  
6     address now that are bothering me the most and they're  
7     related is what the DEA says is that this was a person who  
8     people in Mexico tortured to death.  This was not that  
9     they went in there for narcotics reasons.  They wanted to  
10    get the people who had tortured an American to death.

11            And how do we decide such a thing?  Should each  
12    of the courts of the United States decide that  
13    independently?

14            It's related to the problem of Mr. Mbeki.  
15    Apartheid is a terrible thing, but according to the  
16    government, Mr. Mbeki, I take it -- that's the highest  
17    authority, the President of South Africa, has told the  
18    United States that the judicial efforts to give  
19    compensation to victims are interfering with his efforts  
20    to build a democratic South Africa.  Now, I have to  
21    choose between those two?  I'd say democratic South  
22    Africa, protective of human rights has it all over  
23    compensating the victims even though that's terrible.

24            And what I'm asking you is what kinds of  
25    principles do you suggest that will allow Mr. Mbeki to

1 decide what's right there and not 40 independent Federal  
2 judges somewhere. And how will we decide such things as  
3 to whether this is the kind of effort to get a torturer or  
4 whether it is a violation of -- of law? What are the  
5 principles of limitation in these areas?

6 MR. HOFFMAN: Well, I think that the -- the  
7 first -- in terms of the Alien Tort Claims Act, which I  
8 think is where the South Africa example is coming from  
9 mostly, I think that the -- there -- there are several  
10 limitations that are inherent in the jurisprudence. One  
11 is that it's very difficult to find a customary  
12 international law norm, and it's not -- it wasn't even  
13 easy in this case.

14 In fact, if there was -- if the President  
15 authorized this kidnapping, there's no claim. I should  
16 get that out of the way. There's no claim under -- under  
17 the Alien Tort Claims Act. There's no claim under the  
18 Federal Tort Claims Act. If the President and probably if  
19 the Attorney General said it is in the -- America's  
20 interest to kidnap this person and bring him to justice, I  
21 don't have a claim. But the reason I have a claim --

22 QUESTION: How can --

23 MR. HOFFMAN: -- is that the President didn't do  
24 that.

25 QUESTION: How is that consistent with an

1     acknowledgement that there is an automatically self-  
2     executing brooding omnipresence of customary international  
3     law?

4             MR. HOFFMAN:   Well --

5             QUESTION:   That's just inconsistent with such a  
6     notion.

7             MR. HOFFMAN:   Well, no.   It -- it's actually not.  
8     I mean, what the -- what The Nereide said or what this  
9     Court said in The Nereide is until there's an act, the  
10    courts will enforce the law of nations.

11            In The Paquete Habana, what the Court said was  
12    we will enforce the law of nations, even against the  
13    military, for violations for the law -- laws of war unless  
14    the President -- unless there's a controlling executive,  
15    legislative, or judicial act.   And so if the President  
16    takes a controlling executive act, that's it.   It might  
17    still be a violation of international law, but -- but  
18    under this Court's --

19            QUESTION:   What about the commander-in-chief of  
20    the armed forces?   Would that -- would that suffice?

21            MR. HOFFMAN:   I don't know the answer to that,  
22    although --

23            QUESTION:   Or the Secretary of State.   I want to  
24    know how far down you go.

25            MR. HOFFMAN:   I -- I think that that it probably



1 is the case that it goes down to the President and his  
2 cabinet. In The Paquete Habana, this Court decided that  
3 the decision of an admiral who was charged with the  
4 enforcement of the blockade of Cuba during the Spanish-  
5 American War acted in violation of customary international  
6 law by seizing two fishing boats. Those fishing boats  
7 were returned. Well, they were actually sold. There were  
8 damages issued based on customary law by -- by this Court  
9 for the violation of the law of nations.

10 And -- and in -- in that case, you had a  
11 situation where the dissenters and the Government said  
12 this is a political question. You -- you shouldn't be  
13 able to decide this. The Court said, no, we can decide  
14 the law of nations. We can find the law of nations. We  
15 can even find that the law of nations has evolved so that  
16 the way that fishing vessels were treated during the  
17 Napoleonic Wars might have been a matter of comity, but by  
18 the Spanish-American War, they had ripened into customary  
19 law, which we can find through the methods that have been  
20 employed by the courts of this country since the very  
21 beginning of the republic and before the republic was  
22 created.

23 QUESTION: Mr. Hoffman, a moment ago you cited  
24 the Charming Betsy for a principle that we defer to  
25 international law. Where is that? I don't see any

1 reference to it in your brief.

2 MR. HOFFMAN: Oh, no. We have an entire  
3 section, Your Honor, in the --

4 QUESTION: Well -- yours is the red brief?

5 MR. HOFFMAN: Yes, and it's actually in the  
6 brief in -- in 485, and it is the entire section --

7 QUESTION: Oh, the other red brief.

8 MR. HOFFMAN: It's -- it's section I(C) from  
9 pages 17 through I believe 28.

10 QUESTION: Thank you.

11 MR. HOFFMAN: And -- and the importance of that  
12 principle in this case is that -- the -- the Government  
13 wants you to read authorizing statutes as saying that any  
14 law enforcement agent, employee, or official by just  
15 having a general arrest authority, automatically has  
16 arrest authority over the world. There's nothing in the  
17 legislative history. There's nothing in any history that  
18 says that Congress even had the slightest thought that  
19 they were authorizing worldwide jurisdiction in the  
20 territory of other sovereign states by passing this  
21 general enactment.

22 QUESTION: What if the other -- what if the  
23 foreign state has no objection to it? What if the foreign  
24 state agrees, we would like help from American DEA agents?

25 MR. HOFFMAN: We -- we accept --

1 QUESTION: Under your theory, you'd say --

2 MR. HOFFMAN: No.

3 QUESTION: -- this -- this statute simply does  
4 not authorize foreign arrests.

5 MR. HOFFMAN: That -- that may be the -- on the  
6 presumption of extraterritoriality and the way that --

7 QUESTION: Right.

8 MR. HOFFMAN: -- that the Ninth Circuit read it.  
9 Under the Charming Betsy principle, what our principle is  
10 is the one -- we adopt what the -- what the United States  
11 adopts as the principle of international law, which was  
12 laid out in Judge Sofaer's opinion in March 1980 through  
13 the Office of Legal Counsel which basically said on a  
14 review of all the international authorities, they found  
15 that it was a violation of international law to forcibly  
16 abduct somebody from another country if that country  
17 protested.

18 The protest actually eliminates the problems  
19 that the Government is talking about in terms of finding  
20 consent and whether there's another government that's  
21 recognized, all those things, because what Judge Sofaer  
22 said in the opinion was that acquiescence equals consent.

23 The -- if a foreign government wants to assert  
24 that limit on -- on U.S. law enforcement authority under  
25 international law, it had better make a protest, as Mexico

1 did in this case. And one of the reasons this is such an  
2 unusual case is that you just don't find many situations  
3 where there has been any kind of extraterritorial law  
4 enforcement where there has been a sovereign protest.

5 QUESTION: Okay, but there -- there -- I think  
6 that the conduct that was the basis for the indictment  
7 here, the kidnap and torture and murder of a U.S. DEA  
8 agent in Mexico, can be punished in the United States in  
9 accordance with international law under the effects  
10 doctrine because we can criminalize conduct occurring in  
11 another country that has an effect on our country's  
12 security or core national interests, which clearly this  
13 did.

14 MR. HOFFMAN: I completely agree with that.  
15 There's no question. There has never been in the case  
16 that -- that the statute under which Dr. Alvarez was tried  
17 was extraterritorial. There's no question in -- in my  
18 mind, I don't think anybody's mind, that the United States  
19 in making that statute extraterritorial was acting  
20 consistent with its international obligations.

21 QUESTION: Right.

22 MR. HOFFMAN: But there is a difference between  
23 the jurisdiction to proscribe within international law and  
24 -- and the jurisdiction to enforce those laws.

25 What the -- what the Government says is that if

1     you don't give us this authority, unlimited, anybody -- it  
2     might even be the Forest Service that could do it because  
3     they might have the same statute -- that -- that it's  
4     either that or war.

5             QUESTION: Suppose he'd been guilty, convicted,  
6     30 years. Okay? Now, does he get damages from the United  
7     States on your theory for every day he spent in prison?

8             MR. HOFFMAN: Well, for one thing, the -- the  
9     court -- the court below cut off damages.

10            QUESTION: I'm not talking about this case. I'm  
11     talking about an identical case -- an identical case.  
12     He's convicted, sent to prison for 20 years. Does he get  
13     damages for each of those days?

14            MR. HOFFMAN: Certainly not under the rule  
15     below, and I think --

16            QUESTION: What's the right rule in your --

17            MR. HOFFMAN: What's the right rule? You know,  
18     theoretically I suppose that if you are imprisoning  
19     somebody in violation of international law, you should  
20     have a remedy that responds to that and that's --

21            QUESTION: Okay. That's one of the problems. I  
22     want -- but I -- I've tried to focus the main problem by  
23     calling to mind Mr. Mbeki, and the reason is because it's  
24     such a good example. I would have thought apartheid does  
25     violate norms of international law certainly where

1 violence attaches. I would have thought there are lots of  
2 private people who aid and abet. I would have thought it  
3 would be easy to find a victim and bring a lawsuit, and I  
4 would have also thought it's not totally beyond question  
5 that the president of a country could think they're  
6 counterproductive -- those lawsuits -- in terms of the  
7 democracy we're trying to build. So I've tried to create  
8 some tension there, and I want to know you, who want a  
9 rule --

10 MR. HOFFMAN: Right.

11 QUESTION: -- that allows these suits in the  
12 court -- how does it become limited in this circumstance,  
13 an analogous circumstance?

14 MR. HOFFMAN: I apologize for not completing my  
15 answer. But I started with the idea that there were a  
16 limited number of norms, but there's more to that.  
17 There's, of course, the act of state doctrine. And so --

18 QUESTION: That's why I chose in my example  
19 aiding and abetting by a private citizen of the very bad  
20 thing of apartheid leaving -- leading to deaths and -- and  
21 violence, et cetera, as happened. And -- and if I can't  
22 -- now, the European Commission has a method here in their  
23 brief. So I'm interested is that a proper method.

24 MR. HOFFMAN: Well, I think it --

25 QUESTION: You want to propose some other

1 method, but to propose no method --

2 MR. HOFFMAN: Well --

3 QUESTION: -- it seems to me, is to concede --

4 MR. HOFFMAN: What --

5 QUESTION: -- the validity of the Government's  
6 point about lawsuits here.

7 MR. HOFFMAN: Well, I think that the -- first of  
8 all, particularly in the corporate realm, there has not  
9 been a judgment yet against a corporation in an alien tort  
10 statute case. There just hasn't. And many of them have  
11 been dismissed. Some have been dismissed on the political  
12 question doctrine. We've mentioned some in our brief.  
13 Where there is a conflict between this country's foreign  
14 policy and the progress of the lawsuit, at least in some  
15 circumstances, the case can be dismissed on political  
16 question grounds. On some other cases, it -- it will be  
17 dismissed on act of state grounds.

18 The -- the one pertinent limitation -- and --  
19 and it's actually been raised by the other side -- is  
20 exhaustion of local remedies. And -- and what -- what --  
21 the answer you got on exhaustion of local remedies was  
22 some theorists think that that's part of international  
23 law. It is part of international law. In fact, in a lot  
24 of the early alien tort statute cases, defendants did  
25 raise exhaustion of local remedies.

1           One of the reasons that it hasn't been a big  
2     issue is that a lot of the people that are coming to this  
3     country to vindicate their human rights are refugees that  
4     have fled from places like Burma or revolutionary Ethiopia  
5     or other places that have no legal system and could not  
6     possibly give a local remedy.

7           Now, that won't be the case for -- for cases  
8     that arise in other contexts where there is. And I think  
9     the courts can dismiss based on exhaustion of local  
10    remedies where there are remedies to be done, and that is  
11    not something that -- the -- the court would apply that as  
12    part of -- of international law, as part of the law of  
13    nations because it is part of the law of nations.

14           And so the TVPA actually took the lead from the  
15    alien tort statute in having an exhaustion of local  
16    remedies issue, and I think that a lot of the -- the  
17    issues about separation of powers and -- and the -- the  
18    parade horribles about what might happen because of these  
19    cases, this is --

20           QUESTION: But wouldn't that doctrine require  
21    you to lose this lawsuit?

22           MR. HOFFMAN: Excuse me?

23           QUESTION: Wouldn't the doctrine of exhaustion  
24    of remedies require you to lose this lawsuit?

25           MR. HOFFMAN: Well, no, actually because I don't



1 -- we -- we can't get a remedy in Mexico against --

2 QUESTION: Why not?

3 MR. HOFFMAN: We certainly can't get a remedy in  
4 Mexico against Mr. Sosa. Mr. Sosa is here, and the United  
5 States is here. And what remedy would he get in a Mexican  
6 court if he can't -- this is a transitory tort. I mean,  
7 this is the kind of transitory tort that would have been  
8 well understood by Lord Mansfield, false imprisonment.  
9 That was --

10 QUESTION: What tort issue -- what --

11 QUESTION: That's fine. Why -- why couldn't you  
12 sue him in Mexico, service by mail?

13 MR. HOFFMAN: We could sue him here in the State  
14 court. He has a State cause of action. And in fact, one  
15 of the --

16 QUESTION: Why -- why can't you sue in Mexico?  
17 We're talking about exhaustion of local remedies? Why  
18 couldn't you have sued him in Mexico?

19 MR. HOFFMAN: Where do we get -- where do we get  
20 jurisdiction over him?

21 QUESTION: He committed the tort in Mexico.

22 MR. HOFFMAN: We don't have personal  
23 jurisdiction over --

24 QUESTION: You -- you don't need it. You -- you  
25 serve by mail.

1           QUESTION: That's notice. You certainly do have  
2 personal jurisdiction over him where he acted.

3           MR. HOFFMAN: Well, the only thing I can say is  
4 that for -- we have now been litigating the case, as you  
5 know, since -- for 12 years, and the exhaustion of -- of  
6 local remedies has not come up as a defense. And I think  
7 it would be a defense that the defendant would have to --

8           QUESTION: That's because a lot of people don't  
9 think it's part of international law probably.

10          MR. HOFFMAN: But --

11          (Laughter.)

12          MR. HOFFMAN: I -- I think -- I think it is and  
13 it has been raised.

14          QUESTION: What about restricting these lawsuits  
15 to instances of violation of basic norms of international  
16 law where the international law itself foresees universal  
17 jurisdiction in, of course, the absence of some indication  
18 from Congress that they don't want such lawsuits?

19          MR. HOFFMAN: I think --

20          QUESTION: What about that -- that will not help  
21 your case I don't think in this instance, but I'm looking  
22 in your opinion as an --

23          MR. HOFFMAN: I guess the question -- the  
24 question is from our standpoint the -- the Founders wanted  
25 to enforce the law of nations. What's changed is that the

1 law of nations has changed. Since Nuremberg, there's an  
2 international law of human rights. Some -- some rights  
3 within that have ripened into customary law. And so the  
4 reason you have more cases is that you have a different  
5 world than you had in 1789. That's really what has  
6 changed.

7 QUESTION: It's the human rights enforcement  
8 push, is it not?

9 MR. HOFFMAN: Well, I think it -- I think it is.  
10 And in fact, a Justice of this Court started it. I mean,  
11 it's the Nuremberg principle that individuals can be  
12 responsible for the violation of international human  
13 rights. And what the -- what the alien tort statute has  
14 done is provide a forum for people who have suffered  
15 terrible human rights violations in general in these cases  
16 to come here and have their rights adjudicated when they  
17 find the defendant here.

18 So when one of my clients met her torturer at a  
19 hotel in Atlanta, Georgia, she was able to go to a court  
20 and -- and get a remedy for her torture because her  
21 torturer was here and she was here. And that's the --  
22 that's a paradigm of what -- what this law has been --

23 QUESTION: What about -- what about the  
24 principle that you have some such violations which will  
25 work well if judges in every nation try to enforce them

1 and others where the judges will fall over themselves with  
2 contradictory decisions creating a mess? And one good way  
3 to separate the former from the latter is to look to see  
4 if universal jurisdiction is part of or at least foreseen  
5 by or at least consistent with the international law norm.  
6 I'm looking for ways that are going to avoid the problems.

7 MR. HOFFMAN: I would have two -- two responses  
8 really. One is that the universal jurisdiction principle  
9 is primarily a principle of the assertion of criminal  
10 jurisdiction for certain international crimes. And so I  
11 don't think that it fits very well --

12 QUESTION: But in many countries, criminal  
13 jurisdiction is --

14 MR. HOFFMAN: That's true.

15 QUESTION: -- accompanied by civil  
16 jurisdiction --

17 MR. HOFFMAN: No, that's true.

18 QUESTION: -- because they're right in the  
19 criminal courtroom.

20 MR. HOFFMAN: That's true, and there are  
21 differences in domestic statutes around the world in terms  
22 of -- of enforcement of these kinds of human rights. I  
23 mean, they're incorporated in various ways. There are  
24 universal jurisdictions that -- statutes that apply to  
25 some but not all of these claims.

1 I think that the -- the -- our -- our objection  
2 to that would be that it would be trying to -- to find a  
3 limit that's really not in the statute and really is a --  
4 a function, we think, for Congress to decide. Congress --  
5 there was a question before, has anybody -- has there ever  
6 been an -- an attempt to change the alien tort statute?  
7 As far as we know, there has never been a bill in Congress  
8 to ask for any change.

9 In fact, the administration in the Filartiga  
10 case and in Kadic later basically said -- in Filartiga,  
11 they said it would be a problem for our foreign relations  
12 if we refused to recognize a remedy in this kind of case.

13 And in the Torture Victim Protection Act, it is  
14 very clear in the Senate and House reports, as clear as I  
15 think Congress could possibly be, that Congress liked the  
16 development in Filartiga case. Congress rejected the  
17 arguments that are being made to you by the petitioners in  
18 this case, explicitly with reference to Judge Bork's  
19 opinion in Tel-Oren, and saw none of these problems with  
20 the enforcement of the alien tort statute.

21 QUESTION: Well, they did -- they did in the  
22 Tort Victim Protection Act provide a definite claim,  
23 something with a -- with a statute of limitations, which  
24 is not here, something with a definition of what torture  
25 is, not tort, the world of tort, so that -- that that

1 looks like a model of specificity where 1350 is just the  
2 opposite.

3 MR. HOFFMAN: Well, I think -- well, that's  
4 because of when 1350 was drafted. But I think that the --  
5 I think that those problems are not as insurmountable as  
6 they're made out to be. I think the courts have been able  
7 to deal with those problems in the way that courts have  
8 dealt with them in other areas of the law. I mean,  
9 section 1983, for example, doesn't provide a lot of those  
10 things either, and courts have been able to fashion the  
11 rules that would govern those kinds of cases --

12 QUESTION: But you -- you do -- in 1983, you do  
13 have reference to very specific things, to provisions of  
14 Federal statutory law or to provisions of the  
15 Constitution.

16 MR. HOFFMAN: Well, and you have -- you have in  
17 section 1988 a -- a reference to State law, and this Court  
18 has often had reference to State law and sometimes it's  
19 had reference to rules that are based on -- on different  
20 reasons.

21 But the -- the courts -- I mean, for example, in  
22 the statute of limitations, the statute of limitations in  
23 the Alien Tort Claims Act was -- was shorter before the  
24 Torture Victim Protection Act, and since the Torture  
25 Victim Protection Act, the courts have applied the statute

1 of limitations that Congress believes is appropriate to  
2 those -- to those cases.

3           So I -- I want to -- I know I still don't answer  
4 your -- I'm trying to answer your question. And then my  
5 -- my -- our feeling about that is that those kinds of  
6 policy choices, where there are differences of opinion  
7 even between administrations about how this should be -- I  
8 mean, that's clear. Some administrations think this is a  
9 great way to proclaim to the world our commitment to the  
10 law of nations. Our feeling is that is completely  
11 consistent with what the Founders thought about the law of  
12 nations too. They were proclaiming their commitment to  
13 the law of nations and the alien tort statute does that in  
14 the international human rights field today. We have said  
15 that around the world and -- and it is true.

16           If there need to be modifications to it,  
17 Congress can modify it. There's no question about that.  
18 And even in -- with respect to particular norms, because  
19 this is enforcing the law of nations and because it can be  
20 displaced by -- by controlling executive decisions, we're  
21 protected. There's no norm that's been enforced that the  
22 United States disagrees with. There's a disagreement in  
23 this --

24           QUESTION: What about a suit based on some norm  
25 covered by a treaty where Congress -- where the Senate has

1     said it's non-self-executing?

2                   MR. HOFFMAN:   Right.   Well, I think there are  
3     two different -- there -- there are two different issues  
4     there I think.

5                   One is if the treaty -- if the United States in  
6     the treaty has issued a reservation to the norm, then I  
7     don't -- I don't think it's enforceable.   I think there's  
8     a reservation, we don't accept that norm.

9                   I think the -- the difference with the non-  
10    self-executing declaration is that that doesn't mean that  
11    we don't accept the norms.   The non-self-executing  
12    declaration is -- is we might or we might not.   I mean, it  
13    could be evidence and it might be something that would be  
14    looked at by a court, but the -- what -- what -- because  
15    Article VI of the Constitution says that treaties are the  
16    law of the land and shall be enforced, including by the  
17    courts of the -- of the States, if the United States  
18    entered into human rights treaties without that  
19    reservation, then many norms which are not customary norms  
20    -- in the -- in the International Covenant on Civil and  
21    Political Rights, there are probably a handful of norms  
22    that would be accepted as being customary norms and many  
23    that would go beyond anything that people would argue as  
24    customary.   So the --

25                   QUESTION:   Who -- who decides this?   I'm really



1 am sort of in the woods as to --

2 MR. HOFFMAN: The courts. The courts can decide  
3 this.

4 QUESTION: I see. What -- what --

5 MR. HOFFMAN: The courts have always decided  
6 this kind of thing.

7 QUESTION: 51 percent of the countries of the  
8 world accept them? They're -- they're customary norms?

9 MR. HOFFMAN: No. If there's a division of  
10 opinion, as this Court said in Sabbattino -- and in fact,  
11 in Sabbattino, the United States Government came into the  
12 Court and said, you should decide this case because we  
13 think the law is -- there's a violation of international  
14 law here. And the Court decided, no. There's a diversity  
15 of opinion and -- and the act of state doctrine precludes  
16 us from issuing an opinion in that.

17 And so where there is a genuine diversity of  
18 opinion -- and I would say we have cited several cases  
19 like the Flores case which rejects arguments based on  
20 environmental torts. There are a number of cases that  
21 have brought business kinds of torts that -- that have  
22 just been thrown out of court. And -- and I think that  
23 the -- the courts have done --

24 QUESTION: May I just recall Sabbattino? I  
25 thought the assumption the Court made in Sabbattino was

1     that there was a clear violation of international law, but  
2     nevertheless, the act of state doctrine applied. That's  
3     my recollection of Justice Harlan's opinion.

4             MR. HOFFMAN: I don't -- that would not be what  
5     I would view it as. I think what -- what Justice Harlan  
6     said was there -- there was diverse opinion within the  
7     world about the violation of law.

8             QUESTION: That's not what prompted Justice  
9     White's dissent. He was so upset by the fact that it was  
10    a clear violation of law, but we nevertheless would give  
11    the defense act of state doctrine to Cuba. But you may be  
12    right, but that's my -- it was my recollection of the  
13    opinion.

14            MR. HOFFMAN: My point I guess would be, though,  
15    that where there is diversity among nations or about the  
16    norm, then I don't think they can be forced -- enforced  
17    within the alien tort statute.

18            And I think that in the South Africa case, for  
19    example, I mean, I wouldn't be surprised if that would be  
20    dismissed. It's -- I think there's a motion to dismiss  
21    pending, and it may be that -- that that's the kind of  
22    case that ought not to be in the courts. I don't know  
23    much about the details of it, so it's very hard to make  
24    that kind of comment.

25            But you know, I think that there are -- there

1 are doctrines that the Court has, both domestically and  
2 internationally, to make sure that these problems don't  
3 become the kind of problems that are there. And if they  
4 are problems, they can be remedied. They can be remedied  
5 by Congress. And it seems to us that that's where --  
6 that's where the decision should be made.

7 I see that my time is up.

8 And the -- the closing remark I -- I would make  
9 really is that in -- in *Ker v. Illinois* in 1886, this  
10 Court denied a remedy to someone who had been kidnapped  
11 from another country and said that he could be tried  
12 notwithstanding that violation. The Court also said that  
13 that person would not be without a remedy, that all that  
14 person had to do was bring a suit for trespass and false  
15 arrest, and the Court was sure that that statement would  
16 provide a remedy in the courts.

17 After Dr. Alvarez's acquittal, he took up the  
18 Court on that suggestion that he might get a remedy under  
19 the statutes that Congress has -- where Congress has  
20 authorized the courts to provide redress for -- for those  
21 kinds of torts and for those kinds of violations of the  
22 law of nations. And to -- all that we are asking from  
23 this Court and all we asked in the courts below is that  
24 the courts perform the kinds of functions that courts have  
25 performed for hundreds of years before the republic, all

1 during the republic in providing a damage remedy for the  
2 violation of personal rights.

3 And upholding the modest judgment in this case  
4 is not going to undermine our national security. It will  
5 only affirm the values that have made the -- the country  
6 as great as it is.

7 Thank you very much.

8 QUESTION: Thank you, Mr. Hoffman.

9 Mr. Clement, you have 4 minutes remaining.

10 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

11 ON BEHALF OF PETITIONER THE UNITED STATES

12 MR. CLEMENT: Thank you, Mr. Chief Justice.

13 If I could first address the argument that is  
14 advanced by respondent that we can solve the  
15 extraterritorial arrest problem by simply insisting on  
16 there being consent. I think this Court in its first  
17 Alvarez-Machain opinion at footnote 16 made the point that  
18 there are some issues that are best dealt with in  
19 diplomatic relations between countries and not in the  
20 courts of a single party.

21 And I think consent for an extraterritorial  
22 arrest is a prototypical example of that. In diplomatic  
23 relations between countries, a certain amount of ambiguity  
24 can make the diplomatic relation function and so there may  
25 be varying degrees of consent.

1           In the context of a United States judicial  
2 proceeding, though, the tendency is to bore down and find  
3 out whether there was some modicum of consent, some legal  
4 standard of consent. And I would point again to the  
5 example of Mir Aimal Kasi as how having courts bear down  
6 and figure out the exact extent of consent between  
7 Pakistan and FBI agents in 1997 would not have been a  
8 productive exercise for the courts.

9           A very brief note on the Ker opinion, Ker  
10 against Illinois that was just mentioned at the closing of  
11 respondents' argument. It's true the Court said that  
12 there might be an action for kidnapping in that case, but  
13 this Court did not opine in any way what would be the  
14 relevant law in that kidnapping that occurred in Peru. I  
15 would suggest if it had looked at that issue, it would  
16 have suggested that the law that applied would be the law  
17 of Peru in the same way that if there is any law that  
18 applies to the false arrest here, it is the law of Mexico  
19 and that only underscores that this arrest, even if it  
20 were actionable somehow, would fall within the foreign  
21 country exemption to the Federal Tort Claims Act.

22           If I could say two things about section 1350.  
23 The -- first of all, in terms of trying to divine exactly  
24 what was in Congress' mind when it enacted this provision  
25 in 1789, I would say that that is exceedingly difficult

1 and that strongly suggests that what the Court should do  
2 is simply apply its rules for when there is a cause of  
3 action. But if there is any agreement at all as to what  
4 at least one of the events that led to the passage of the  
5 statute was, it was the events involving ambassadors in  
6 the United States and violations and assaults on those  
7 ambassadors. And I think the reaction to those assaults  
8 is telling.

9 First, there were no civil actions ever brought  
10 in the courts that anybody is aware of to remedy those  
11 actions. What were brought are common law criminal  
12 actions. That's what the Longchamps case in Pennsylvania  
13 was. It was a common law criminal action.

14 Now, I don't think anybody would suggest that a  
15 common law criminal action in law of nations somehow  
16 survives this Court -- this Court's decision in Hudson,  
17 saying there's no longer any common law criminal  
18 jurisdiction. In the same way, to the extent that the  
19 Court -- the Congress may have had in mind some general  
20 common law action that was available, there's no  
21 particular reason why that decision should withstand the  
22 Erie decision.

23 But again, I think it is noteworthy that there  
24 was no civil action in response to those incidents. What  
25 there was is the 1781 Continental Congress action, and it

1 just didn't ask the court -- the State courts to do  
2 something about this. It told the courts to authorize  
3 actions. The one court -- the one State that took up the  
4 challenge was Connecticut, and if you look at what  
5 Connecticut did, it is very telling because first they put  
6 in a jurisdictional provision. Then as a separate  
7 provision, they used language that is rights-conferring  
8 language. It seems obvious that Congress with section  
9 1350 did the former but not the latter. There is  
10 jurisdiction, but there is not any rights-creating  
11 language.

12 Now, it may be a bit anomalous to apply this  
13 Court's current conception to an old statute like the  
14 Judiciary Act of 1789, but this Court has done it before.

15 Thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
17 Clement.

18 The case is submitted.

19 (Whereupon, at 12:31 p.m., the case in the  
20 above-entitled matter was submitted.)

21

22

23

24

25